breach of contract, which if allowed would seem to be peculiar to insurance. The courts today, even some of those which are committed to this doctrine, do not look favorably upon it, but quite generally favor the doctrine that the present value only of the policy may be recovered. What this present value may be is difficult of ascertainment. The cost of securing a like policy in another company offers a fair test if the plaintiff is still insurable. *Speer* v. *Phoenix Ins. Co.*, 36 Hun. 322. The difference between the amount paid with interest and the costs of carrying the risk was laid down in *People* v. *Security Ins. Co.*, 78 N. Y. 114, 34 Am. Rep. 522. This gives nothing for the loss of the policy itself. The court in the principal case lays down a rule which seems just and equitable as well as capable of general application. The present value is such sum as at a reasonable rate of interest, would equal at the end of the period of expectancy the face of the policy, minus the premiums that would have been paid during this period with interest thereon. If the insured is in ill health the question of premiums may be submitted to a jury assisted by the testimony of insurance experts. The damages recoverable, says the court, are what it would cost to carry the contract into effect, which in all cases of breach is the true measure of damages.

INSURANCE—SUBROGATION IN EMPLOYER'S LIABILITY INSURANCE.—Plaintiff insured a brewing company against any loss occurring under a statute making an employer liable for the death of an employee. Defendant, a machine erecting company employed by the brewing company, negligently caused the death of an employee. Plaintiff, the insurer, paid the loss which the brewing company incurred by reason of its statutory employer's liability for such death and now seeks to be subrogated to the brewing company's right to recover for the loss occasioned by defendant's negligence. *Held*, that the insurance contract is one of indemnity and that the insurer is entitled to be subrogated to the rights and claims of the brewing company, which rights include a cause of action against the defendant for the loss caused by the negligence of the latter. *Traveler's Ins. Co.* v. *Great Lakes Engineering Works Co.* (1911), — C. C. A., 6th Cir. —, 184 Fed. 426.

It is well settled that an insurer making payment under a life policy is not entitled to be subrogated to any rights as against a tort feasor who may have wrongfully brought about the death of the insured. This rule rests upon the theory that at common law a personal action dies with the person and hence no right of recovery, to which the insurer could claim subrogation, survives the death of the insured. Nor is this rule altered, as far as concerns the insurer, by statutory provisions giving the surviving wife and children a right of recovery for the killing of a man, for such right accrues only to those nominated in the statute and is not subject to subrogation by the insurer. *Mobile Ins. Co.* v. *Brame*, 95 U. S. 754, 24 L. Ed. 580. *Connecticut Mut. L. Ins. Co.* v. *New York & N. H. R. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571. In general when an insurer pays to the insured the amount of the loss, such insurer is subrogated in corresponding amount to the insured's right of action against the person responsible for the loss. 4 COOLEY'S BRIEFS ON THE LAW OF INSURANCE, 3893. *United States Casualty Co.* v. *Bagley*, 129 Mich. 70, 87

N. W. 1044, 55 L. R. A. 616, 95 Am. St. Rep. 424. The right of the insurer to subrogation can be effective only when a right of recovery exists in the insured, and no cause of action can exist in behalf of the insurer unless it existed in favor of the insured. *United States* v. *American Tobacco Co.*, 166 U. S. 468, 17 Sup. Ct. 619, 41 L. Ed. 1081, *Omaha & R. V. Ry. Co.* v. *Granite State Ins. Co.*, 53 Neb. 514, 73 N. W. 950. It was held, in the case under discussion, that such a right of recovery did exist in favor of the brewing company—the insured—against the defendant for its negligence in killing a fellow employee. This right of recovery possessed by the brewing company was in no way dependent upon a common law or statutory right of recovery for tortiously causing the death of a human being. It arose out of the rule that where an employer is not in fault but has nevertheless been compelled to pay damages to a third person for the negligence of his employee, he may maintain an action over against such employee to recover what he has been compelled to pay. STORY, AGENCY Ed. 9, § 217. 4 THOMPSON, NEGLIGENCE, § 3870. Since the right of recovery existed in favor of the insured it was held that the plaintiff, the insurer, should be subrogated to this right. The court argues that the doctrine of subrogation which applies to indemnity contracts of fire and marine insurance should by analogy apply to contracts of insurance indemnifying employers against statutory liability for the negligent killing of its employees, and that the principles involved are in no way analogous to the principles which are the basis of the doctrine refusing subrogation in life policies.

INSURANCE—TEMPORARY PRESENCE OF FORBIDDEN SUBSTANCE ON PREMISES. —In an action on a fire insurance policy issued to cover plaintiff's factory, the insurer defended, on the ground that the policy had been vitiated about five weeks previous to the fire by the presence on the premises of five gallons of gasoline for a period not exceeding an hour, the policy containing a provision to the effect that it should be void if gasoline was "kept, allowed or used" on the premises. *Held,* that the temporary presence of the gasoline did not avoid the policy. *Clute et al.* v. *Clintonville Mut. Fire Ins. Co. et al.* (1911), — Wis. —, 129 N. W. 661.

The courts are somewhat divided as to the effect of temporary violations of such conditions in insurance policies. The better rule says VANCE (INSURANCE, p. 434), is to the effect that a breach of the condition may always be shown as a defense even though it may have been but temporary and in no way affecting the insurer injuriously. The rule as expressed in Illinois is to the effect that a temporary forbidden condition only suspends the policy during the existence of this condition. *New England Fire Ins. Co.* v. *Wetmore,* 32 Ill. 221; *Traders Ins. Co.* v. *Catlin,* 163 Ill. 256. In the former the court reasons that it cannot see the justice of denying a recovery simply because there was a temporary minor increase of risk, for a period of time more or less remote as the case may be, resulting in no injury to the company. The court might be able to see the justice were it to consider the fact that the parties have so contracted. Undoubtedly the insurer is entitled to protection in case of temporary risk. In *Kyte* v. *Com. Assur. Co.,* 149 Mass.